

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CALVIN E. WIGGINS,)	
Petitioner)	
)	
v.)	Civ. No. 03-6-B-S
)	
STATE OF MAINE,)	
Respondent)	
)	

RECOMMENDED DECISION ON 28 U.S.C. § 2254 MOTION

Calvin Wiggins, a prisoner at the Maine State Prison in Warren, Maine, has filed a petition seeking habeas corpus relief pursuant to 28 U.S.C. § 2254, claiming that his trial counsel provided ineffective assistance resulting in his 1998 conviction for robbery. The State of Maine has responded to his petition. I now recommend that the court **DENY** his requested relief.

Background

In May 1998 a grand jury returned two separate indictments against Calvin Wiggins, each indictment charging him with one count of robbery in violation of 17-A M.R.S.A. § 651 (Class A). One robbery occurred in York, Maine and the other in Sanford, Maine. Wiggins became a suspect in both robberies because his name had been given to the Sanford police as one of five or six African Americans living in the neighborhood. Wiggins's photo was included in photo arrays shown to eyewitnesses from both robberies. Three separate people identified Wiggins as the robber and he was charged in both cases. Ultimately the cases were joined for trial over the defense's objection. Trial commenced October 13, 1998. The jury acquitted Wiggins in

connection with the Sanford robbery, but convicted him on the York robbery. On October 28, 1998, Wiggins was sentenced to fifteen years imprisonment.

Prior to the commencement of the trial Wiggins's counsel filed a motion to suppress what he alleged was improperly suggestive prior out-of-court eyewitness identifications made by two witnesses to the York robbery. Following a testimonial hearing the Superior Court denied the motion. The issue of identification of the defendant remained the predominant issue at the trial of this matter as there was no other direct or circumstantial evidence linking Wiggins to the offense.

Wiggins filed a timely notice of appeal to the Law Court following his sentencing. One of the issues raised on direct appeal was that the in-court identification of Wiggins violated his federal constitutional right to due process. On October 29, 1999, the Law Court denied the direct appeal. Earlier, the Court had denied Wiggins's application for leave to allow an appeal of the sentence of imprisonment imposed on the conviction.

On August 18, 1999, Wiggins filed a state post conviction petition for review pursuant to 15 M.R.S.A. §§ 2121 -2129. In that petition Wiggins alleged that his trial counsel was ineffective in his representation regarding multiple eyewitness identification issues. In October 2001 a testimonial evidentiary hearing was held on the petition. In sum, Wiggins alleged eight bases of ineffective assistance of counsel regarding issues surrounding identification at trial. Those eight issues were substantially identical to the eight issues raised by this pleading. On January 10, 2002, the Superior Court denied Wiggins's post-conviction petition, making a specific factual finding that trial counsel was not ineffective. On March 11, 2002, the Law Court swiftly rebuffed Wiggins's attempt to obtain a certificate of probable cause to appeal. The instant 28 U.S.C. § 2254

petition was filed in this court on January 10, 2003. The State concedes that the petition is timely pursuant to 28 U.S.C. § 2244(d)(1)(A) and that Wiggins has fully exhausted his federal claims in the state courts within the meaning of 28 U.S.C. § 2254(b)(1)(A).

The Facts as Presented at the Trial

Travis Hardy, a part-time clerk at the Dead River Gas Station in York, Maine, was working at the station on December 30, 1997. At around 8:00 p.m., Hardy's friend, Jason Hanson, came by to visit with him. As the two of them were sitting in the front part of the gas station a man, described as an African American about six-feet tall and weighing about two-hundred pounds, entered the gas station. This man was well dressed, wearing a Ralph Lauren parka and a cap on his head. The man asked for change and as Hardy went to get the change he observed the man pull a mask down over his face and point a gun at him. Hanson was ordered into the restroom and Hardy was ordered to empty the safe. The robber left with approximately \$1500.

The second robbery took place in Sanford, Maine, at Christy's convenience store. Terri Vance, the clerk on duty, reported that at approximately 2:23 a.m. on January 1, 1998, a well dressed African American weighing approximately 200 pounds entered the store. He pulled out a gun and demanded money. He also pulled a ski mask over his face. Vance gave him the contents of the register.

At trial Hardy made an in-court identification of Wiggins. He also testified that on two occasions after the robbery and prior to trial he had been shown photo line-up arrays by Kevin LeConte of the York Police Department. Hardy had not identified any photo in the first array. On February 18, 1998, Hardy was shown the second photo array (State Ex. No. 2) and he testified that he identified the person in photo number five as the

person who robbed him. On cross-examination Hardy admitted that after he had made his identification of photo number five Detective LeConte had enforced his confidence in his identification by revealing to him that Wiggins was the guy the police had as a suspect. Trial counsel also cross-examined Hardy extensively regarding his inability to observe the robber's facial characteristics the night of the robbery.

Jason Hanson also made an in-court identification of Wiggins as the robber. Hanson confirmed that he was shown photo arrays by LeConte on two separate occasions. Like Hardy, Hanson failed to pick a photograph from the first array. When the second photo array (State Ex. No. 2) was presented to Hanson at trial, he identified photo number four as the photo he picked out when shown the array by LeConte. (Tr. at 77.) On cross-examination, in response to defense counsel's leading question, Hanson identified photo number five as the picture he had identified when first shown the array by LeConte. (Tr. at 85.)

Terri Vance, the clerk from the Sanford store, also made an in-court identification of Wiggins as the robber. Vance was sure that the robber of her store was wearing glasses. She identified photo number six (State Ex. No. 1) as a picture of the defendant that she had previously identified when it had been presented to her by a police officer on February 13, 1998. The photo array shown to Vance and from which she made her identification depicted Wiggins wearing glasses. She was then shown State Exhibit Number 2, the photo array viewed by Hanson and Hardy, containing Wiggins's photo, sans glasses, at number five, but she was unable to make an identification from that photo array.

Gordon Littlefield of the Sanford Police Department and Kevin LeConte of the York Police Department both testified at the trial concerning their investigations.

Wiggins's counsel suggested through cross-examination that there were a number of alternate suspects who had been inadequately investigated. He brought out that both officers suggested to the witnesses that their identifications conformed with the suspect developed by the police investigations. He attacked other inadequacies in the investigation, such as the Sanford police's failure to dust for fingerprints, even though Vance described the robber as gloveless, and pointed out certain areas where he placed his hands.

By way of defense Wiggins put forth the testimony of Michelle Smith, his girlfriend, who testified that she spent New Year's Eve with Wiggins and therefore he could not have committed the Sanford robbery. Wiggins's counsel also introduced evidence that an African American matching the description provided by Terri Vance had been seen in the Mobil Mart and the Irving station located near Christy's on or about January 1. The investigating officer testified that he had viewed store surveillance tapes and the person in those tapes was not Calvin Wiggins. (Tr. at 233.) He also testified that Terri Vance had never been shown the videotapes.

In his closing argument Wiggins's attorney emphasized the similarities between the robberies and that they were both obviously committed by the same person (Tr. at 278.) Counsel suggested to the jury that person had to be the unidentified man on the Irving video who is "somewhere sitting down wherever he is laughing," (*id.*), because the police had the wrong man. Wiggins's counsel asked the jurors to rely upon their common sense and recognize the difficulties people have when trying to make cross-

racial identifications. (Tr. at 280.) The prosecutor likewise argued that the two robberies were committed by the same person, but that person was the defendant. She maintained that the appearance of the man on the videotape differed significantly from Vance's description of the robber and that the attempt to introduce the videotaped "suspect" was nothing more than a "red herring." (Tr. at 285.) Ultimately Wiggins was convicted of the York robbery and acquitted of the robbery in Sanford.

Claims of Ineffective Assistance of Counsel

In his petition Wiggins alleges only one ground: he was denied the effective assistance of counsel at trial in violation of his rights under the United States Constitution. In his memorandum of law in support of his petition he spells out eight specific claims that he says amount to ineffective assistance. Each of these claims was raised previously before the State Superior Court at the time of the post-conviction proceeding. Wiggins asserts that counsel's performance was constitutionally deficient in the following ways:

1. He failed to object to non-identification evidence.
2. He failed to present evidence of petitioner's look-a-likes.
3. He failed to object to the in-court identification.
4. He failed to conduct research or cross-examine witnesses on cross-racial identification.
5. He failed to cross-examine Travis Hardy concerning his vague memory of the robber.
6. He failed to argue that Jason Hanson had been unable to pick out Wiggins from a photo array shown to him by the defense investigator.
7. He failed to argue to the jury the significance of Hanson having mistakenly identified photo number four as the robber during direct examination.
8. He failed to ask the court to give a jury instruction geared to cross-racial identification.

The State Court Decision

The state court post-conviction trial justice made the following findings regarding counsel's performance vis-à-vis the identification issues:

At the post-conviction hearing, counsel for Mr. Wiggins and Mr. Wiggins skillfully pointed out other ways, perhaps even more effective ways, that trial counsel could have challenged the reliability of the identification. Trial counsel was very candid and was very hard on himself. He essentially confessed that he could have done better. Assuming that he could have, that is not the test. The question is whether there was serious incompetency, inefficiency or inattention which falls below that which is expected from an ordinary[,] fallible attorney.

Examining other reported Law Court cases is helpful. In Lagasse v. State, 655 A.2d 328 (Me. 1995) there was no investigation in a case where the production of a medical record would have supported the defendant's alibi. The granting of a post-conviction relief was affirmed. In State v. Brewer, 699 A.2d 1139 (Me. 1997) there were significant failures regarding pretrial investigation and in other areas.

In our case[], trial counsel had a strategy and used it to challenge the identification. In one case an acquittal resulted. In the other a conviction was obtained. In retrospect other ways of challenging the identification can be found. Trial counsel went after the identifications. The test is not whether he challenged the identifications in the best possible way, if we can even determine what that way is. The test is whether the defendant received effective assistance of counsel as defined by [Strickland]¹. He did.

(Dec. & Order at 1-2.)

Discussion

This court reviews Wiggins's 28 U.S.C. § 2254 ineffective assistance of counsel claims under the Sixth Amendment standard framed in Strickland v. Washington, 466 U.S. 668 (1984) as seen through the prism of § 2254(d)(1) review articulated in Williams v. Taylor, 529 U.S. 362 (2000). Wiggins must demonstrate not just that the

¹ The post-conviction justice actually cited to Maine cases at this juncture. However, the standard Maine courts apply is to be read as being equivalent to the Strickland ineffective assistance of counsel analysis. Kimball v. State, 490 A.2d 653, 656 (Me.1985); accord Brewer v. Hagemann, 2001 ME 27, ¶9, 771 A.2d 1030, 1033; see also Mello v. DiPaulo, 295 F.3d 137, 144 (1st Cir. 2002) (observing that the Strickland and Massachusetts standards are the "functional equivalent" for purposes of proceeding with the § 2254(d)(1) determination).

Strickland standard for ineffective assistance of counsel was met, but also that the state court's adjudication of his constitutional claims "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

A state court decision is "contrary to" clearly established federal law when it applies a rule that contradicts the rule set forth in the Supreme Court's governing cases, Williams, 529 U.S. at 405, or if the state court confronts facts materially indistinguishable from a United States Supreme Court decision and arrives at a different result, id. at 406. A state court decision involves an "unreasonable application" of clearly established federal law if the state court identifies the correct governing Supreme Court legal principle but unreasonably applies that principle to the facts of the case. Id. at 413.

Also to be heeded is the Williams distinction between "an unreasonable application of federal law" and "an incorrect application of federal law." Id. at 410. This court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Id. at 411.

The determination of the state court in this instance is clearly not "contrary to" any governing precedent. That is to say, the state court determination does not apply a rule that contradicts governing Supreme Court precedent nor does it apply a rule improperly to a materially indistinguishable set of facts from those set forth in any governing Supreme Court precedent (of which I am aware). Wiggins's leverage, then, if he has any, must be that the state court's application of the Strickland standard was

unreasonable. The state post-conviction justice's decision clearly indicates he applied Strickland's test of reasonable competency to the facts presented at the post-conviction hearing and he concluded that counsel's performance, while not perfect, was not constitutionally deficient.

To demonstrate ineffective assistance of counsel in violation of the Sixth Amendment, Wiggins would have had to establish (1) that "counsel's representation fell below an objective standard of reasonableness," and (2) "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 688, 694; *see also Scarpa v. DuBois*, 38 F.3d 1, 8 (1st Cir.1994). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694.

Given the nature of this case, depending entirely as it does upon the uncorroborated testimony of eyewitnesses, I think it is fair to say that if the state court's determination regarding the objective reasonableness of counsel's performance was indeed unreasonable, then it would likewise follow that its decision to deny post conviction relief based upon ineffective assistance of counsel was likewise unreasonable. This is so because if the eyewitness identifications of Hardy and Hanson had been placed in reasonable doubt, there would have remained no evidence upon which Wiggins could have been convicted. Thus, it appears to me that Wiggins's claim rises or falls based upon the reasonableness of the State court post conviction justice's determination of counsel's competency under the first prong of Strickland. If counsel had been able to successfully create a reasonable doubt about the Hanson and Hardy identification

testimony, there is clearly not only a reasonable probability, but indeed a virtual certainty, that the outcome of this case would have been different.

In the present case trial counsel admitted that he “missed some major details in the [York] case” regarding identification issues including, but not limited to, Hanson’s failure to pick the photo of Wiggins during trial (Post-conviction Tr. at 36); the possibility that he could have validly objected to Kevin LeConte’s hearsay testimony regarding non-identification (Id. at 41-45); the opportunity to request a jury instruction on the issue of cross-racial identification (Id. at 59); and the fact that the in-court identification was conducted under extremely suggestive circumstances since Calvin Wiggins was the “only black guy in the whole area.” (Id. at 50). Furthermore, Wiggins’s private investigator, Nance Monaghan, testified at the post-conviction hearing about having interviewed Jason Hanson in August of 1998. According to Monaghan when Hanson was shown photocopies of the photo arrays containing Wiggins’s photo, he was unable to identify anyone. Monaghan conveyed this information to trial counsel and expressed surprise at never having been asked about it when testifying during the trial. (Id. at 21-23). The post conviction justice concluded that these admitted failings did not amount to “serious incompetency, inefficiency or inattention which falls below that which is expected from an ordinary fallible attorney.”²

² In the context of ineffective counsel challenges the general Strickland test provides the departure point, but there are a myriad of alleged infirmities in a criminal proceeding that can form the substantive underpinning of Strickland claims. See Ouber v. Guarino, 293 F.3d 19, 26 (1st Cir. 2002). In Arizona v. Youngblood, 488 U.S. 51 (1998) the Supreme Court reviewed an Arizona Court of Appeals reversal of conviction for child molestation, sexual assault, and kidnapping. The State’s Court of Appeals had concluded that reversal was dictated because the State had failed to preserve semen samples from the victim’s body and clothing. Id. at 52. The Supreme Court “granted certiorari to consider the extent to which the Due Process Clause of the Fourteenth Amendment requires the State to preserve evidentiary material that might be useful to a criminal defendant.” Id. Partly as a consequence of the dearth of other inculpatory or exculpatory evidence, Youngblood’s main defense at trial was that the ten-year-old male victim had erred in identifying Youngblood as the perpetrator of the crime. Id. at 54. The majority

Given the number of times Wiggins’s attorney dropped the ball when given the opportunity to attack the identification of Wiggins, I might reach a different conclusion if I were undertaking a habeas review of a federal conviction. However, “the only question that matters under § 2254(d)(1)” is “whether the decision is contrary to, or involved an unreasonable application” of Strickland. Lockyer v. Andrade, 538 U.S. ___, ___, 123 S. Ct. 1166, 1172 (2003). It is not enough if, in my independent review I am left with “‘a firm conviction’ that the state court was erroneous.” Id. at 1175 (quoting the Ninth Circuit decision it reversed, 270 F.3d 743, 753 (9th Cir. 2001)). Rather than looking at whether the state post conviction court erred, I “instead focus solely on whether § 2254(d) forecloses federal habeas relief.” Id.; see also id. at 1173-75 (discussing the limitations on a federal court’s § 2254(d)(1) inquiry vis-à-vis state court convictions).

In this case, Federal habeas relief is foreclosed unless the state court application of the ineffective assistance standard was objectively unreasonable. Id. at 1175.

"Reasonableness is a concept, not a constant." United States v. Ocasio, 914 F.2d 330,

distinguished the State’s obligations vis-à-vis exculpatory materials mapped in Brady v. Maryland, 373 U.S. 83 (1963) and United States v. Agurs, 427 U.S. 97 (1976) and concluded that, absent a showing of bad faith, there was no duty under the Due Process clause to preserve evidentiary material for testing or to use a particular investigatory tool. Id. at 55-59.

Justice Blackmun, in a vigorous dissent joined by Justices Brennan and Marshall, argued that the State’s bad or good faith was not determinative, and stated that the majority ought to have inquired “whether the evidence in question was ‘constitutionally material.’” Id. at 61-66. In Blackmun’s view, “where no comparable evidence is likely to be available to the defendant, police must preserve physical evidence of a type that they reasonably should know has the potential, if tested, to reveal immutable characteristics of the criminal, and hence to exculpate a defendant charged with the crime.” Id. at 69. Observing that the only evidence implicating Youngblood was the testimony of the victim, id. at 72, Blackmun commented on the inherent unreliability of uncorroborated cross-racial eyewitness identification testimony, id. at 72 n.8 (1998).

Though Youngblood does not entirely align with this case, the dialogue between the majority and dissent in Youngblood is instructive for reviewing the State court’s application of Strickland. The Youngblood majority made clear that the prosecution based on the victim’s testimony alone – even when the State could have pursued other evidence – did not violate the defendant’s due process rights, Blackmun’s protest aside. The Maine Law Court touched upon a similar concern in State v. Kelly, 2000 ME 107, 752 A.2d 188, but did not need to grapple with the question. It did note, with seeming approval, that “the court instructed the jury that it could consider whether the respective races of the victim and the defendant had any bearing on the reliability of the driver’s identification.” Id. ¶ 11, 752 A.2d at 191.

336 (1st Cir.1990). Reasonableness is a term, “difficult to define,” but “it is a common term in the legal world and, accordingly, federal judges are familiar with its meaning.” Williams, 529 U.S. at 410. To reiterate: “The most important point is that an unreasonable application of federal law is different from an incorrect application of federal law.”” Id.

Under this standard I cannot say that the Maine post conviction court’s conclusion that Wiggins’s attorney’s performance was not constitutionally deficient was an “unreasonable application” of Strickland. It is not objectively unreasonable for the court to have concluded that counsel did not make “errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” Strickland, 466 U.S. at 687. After all, the Strickland standard itself is highly deferential, id., at 689 (“A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time.”), and so I view Wiggins’s § 2254 claims through a double layer of deference.³

Conclusion

For the reasons given, I recommend that the Court **DENY** Wiggins 28 U.S.C. § 2254 relief.

³ And though I find the missed opportunities by counsel on such key concerns in this case troubling, the majority’s conclusion in Youngblood, see supra footnote 2, over Blackmun’s dissent, only stays my hand further.

Ironically, if, hypothetically, the Supreme Court were reviewing the Arizona Court of Appeals’ determination that due process was violated under the standard of § 2254(d)(1), rather than on writ of certiorari from the direct appeal, it too would probably have let the Court of Appeals reversal of Youngblood’s conviction stand. Of course, the question would not be teed-up for § 2244(d)(1) review with a defendant-favorable state court determination.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

Dated: April 2, 2003

Margaret J. Kravchuk
U.S. Magistrate Judge

ADMIN

**U.S. District Court
District of Maine (Bangor)
CIVIL DOCKET FOR CASE #: 1:03-cv-00006-GZS
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WIGGINS v. CORRECTIONS, ME WARD
Assigned to: Judge GEORGE Z. SINGAL
Referred to: MAG. JUDGE MARGARET J.
KRAVCHUK
Demand: \$0
Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:2254 Petition for Writ of Habeas Corpus
(State)

Date Filed: 01/10/03
Jury Demand: None
Nature of Suit: 530 Habeas Corpus
(General)
Jurisdiction: Federal Question

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